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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

STOCKHOLMS ENSKILDA BANK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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No. 895.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
STOCKHOLMS ENSKILDA BANK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 8-10) is reported in 25 B. T. A. 1328. The opinion of the Court of Appeals of the District of Columbia (R. 19-22) is reported in 68 Fed. (2d.) 407.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered December 4, 1933. On February 26, 1934, the Chief Justice entered an order granting an extension of time for the filing of a petition for a writ of certiorari for sixty days from March 4, 1934. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether interest paid during 1927 by the United States, pursuant to Section 1116(a) of the Revenue Act of 1926, to a foreign corporation upon a refund of income taxes theretofore overpaid for a prior year, falls within the general rule prescribed by Section 217(c) (1) of the Revenue Act of 1926 that interest paid to a foreign corporation is to be "treated as" income from sources without the United States, or the exception prescribed by Section 217(a) (1) of the Revenue Act of 1926 that "interest on bonds, notes and other interest-bearing obligations of residents, corporate or otherwise", is to be "treated as" income from sources within the United States; and, if such interest falls within such exception, then:

(a) Whether such interest is exempted from tax by Section 213(b) (4) of the Revenue Act of 1926; and if not,

(b) Whether such interest is allowable as a credit against income by virtue of Section 236(a) of the Revenue Act of 1926.

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 230. (a) In lieu of the tax imposed by section 230 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax at the following rates: * * *. (U. S. C. A., Title 26, Section 981 as amended.)

Sec. 232. In the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed * * *. (U. S. C. A., Title 26, Section 984.)

Sec. 233. (b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in section 217. (U. S. C. A., Title 26, Section 985.)

Sec. 217. (a) In the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or (B) interest received from a resident alien individual, a resident foreign corporation, or a domestic corporation, when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor or domestic corporation has been derived from sources within the United States, as determined under the provisions of this section, for the three-year period ending with the close of the taxable year of such payor preceding the payment of such interest, or for such part of such period as may be applicable;

* * * * *

(c) The following items of gross income shall be treated as income from sources without the United States:

(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a); * * *. (U. S. C. A., Title 26, Section 958.)

Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

* * * * *

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes; * * *. (U. S. C. A., Title 26, Section 954.)

Sec. 236. For the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

(a) The amount received as interest upon obligations of the United States which is included in gross income under section 233; * * *. (U. S. C. A., Title 26, Section 988.)

Sec. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount. (U. S. C. App., Title 26, Sec. 153.)

Statement.

During the year 1927, Stockholms Enskilda Bank, a foreign corporation with no office or place of business in the United States, received from the Treasury of the United States $8,683.91 as interest upon an overpayment of Federal income taxes (R. 8). The Commissioner included this sum in the Bank's gross income for the year 1927, and determined a deficiency of $1,172.32 (R. 4-5). Appeal was taken to the Board of Tax Appeals where it was held that such interest is not within the definition of income to be "treated as" from sources within the United States and consequently not to be included in the gross income of a foreign corporation (R. 8-10). The Commissioner appealed to the Court of Appeals of the District of Columbia (R. 11-13), where the decision of the Board of Tax Appeals was affirmed.

ARGUMENT.

I.

The question presented is not whether this interest was derived from sources within the United States, but only whether such interest falls within the general rule of non-taxability prescribed by Sec. 217(c) (1) or the exception thereto provided in Sec. 217(a) (1).

In the view of the respondent, neither the Court of Appeals of the District of Columbia nor the United States Board of Tax Appeals held that the interest paid to the respondent upon the overpayment of its taxes did not constitute income from sources within the United States. Under the provisions of the applicable Revenue Act, the place from which the interest emanated was not important. What was decided was that the interest did not fall within the compass of the definition, contained in Section 217(a)(1) of the Revenue Act of 1926, of interest to be "treated as" income from sources within the United States, but, rather, fell within the scope of Sec. 217(c)(1), which provides that interest other than that within the definition of Sec. 217(a)(1) "shall be treated as" from sources without the United States.

In consequence, it is the respondent's contention that not only is the question presented not clearly stated in the petition, but also the first specification of error, if not actually without foundation, is at least inaccurately phrased.

The distinction noted is fundamental. If the criterion of taxability established by the Revenue Act of 1926 were the fact of the source of the income, an entirely different situation would present. Under the Revenue Act of 1918 and the preceding Revenue Acts, income was taxable, or not taxable, to a foreign taxpayer depending upon its source. At the time of the enactment of the Revenue Act of 1921, however, after very full

discussion, and in consideration of the many difficulties encountered in determining the true source of many classes of income, the Congress decided to abandon the fact of the source of income, as the criterion of its taxability, and to substitute in lieu thereof a system of definitions of various classes of income to be "treated as" from sources within or without the United States.[1]

This new criterion established by the 1921 Act was carried forward into the 1924 and 1926 Acts, and has been continued substantially unchanged down to and including the current Revenue Act. The Revenue Act of 1926, which is the statute under consideration, provides, in Section 217(a)(1), that "interest on bonds, notes, or other interst-bearing obligations of residents, corporate or otherwise" shall be treated as income from sources within the United States; and, in Section 217(c)(1), that other interest "shall be treated as income from sources without the United States". In its opinion, the Board of Tax Appeals expressly recognized the real question in these words: (R. 9) "It is at once apparent that all interest, even though concededly from sources within the United States, is not to be treated as interest from sources within the United States, for subdivision (c)(1) of Section 217 provides that interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a) shall be treated as income from sources without the United States. Therefore to constitute gross income from sources within the United States the interest herein must be brought within the provisions of said paragraph (1) of subdivision (a)."

The Court of Appeals of the District of Columbia also recognized the true question, for, although it did say (R. 20) that the Board had held the interest not to be

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[1] The pertinent provisions of the Revenue Acts of 1913, 1916, 1918 and 1921, together with extracts from the Congressional Reports on the Revenue Act of 1921 are printed as an appendix to this brief (*infra*, p. 15).

"'income from sources within the United States' as defined by Section 217", it also stated (R. 21) "* * * the amount of interest * * * would be taxable * * * only in case the payment came within the classification of 'Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, * * *'".

The question presented, then, is merely one of statutory construction: Whether interest paid by the United States upon a refund of taxes falls within the explicit terms of the definition contained in Section 217(a)(1).

II.

The decision of the Court below appears to be correct.

If from a consideration that words in a statute should be given their commonly understood meanings, it be held that this "interest" was interest at all, rather than merely damages for the unlawful retention of money, nevertheless a strict construction should be applied to the definition contained in Section 217(a)(1), for that subsection expresses an exception to the general rule laid down in Section 217(c)(1). An exception to a general rule includes only what its plain language embraces, must not be extended by implication, the expression of one exception excludes all others, and all doubts must be resolved in favor of the general rule.

> *Bend* v. *Hoyt*, 13 Pet. 263; 271, 272, 273;
> *Spokane & Inland R. Co.* v. *U. S.*, 241 U. S. 344; 350.

In addition, as this Court has often stated, a doubt in a taxing statute must be resolved in favor of the taxpayer.

> *United States* v. *Merriam*, 263 U. S. 179; 187, 188;
> *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; 348;
> *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648; 654.

But without the benefit of the rules of strict construction referred to, this interest does not fall within the ambit of the definition contained in Section 217(a)(1). To be taxable to a foreign corporation, interest must be on a bond, note or other interest-bearing obligation; and further, such bond, note or other interest-bearing obligation, must be that of a resident, corporate or otherwise. As respondent contends, the interest here in question fulfills neither of these requirements.

By the familiar rule of *ejusdem generis*, the word "obligation" should be confined in its meaning to obligations of the same kind or species as those comprehended by the preceding terms, "bonds" and "notes".

In its opinion (R. 9), the Board declined to apply the rule because in Section 217(a)(1) the words "interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise" are followed by "not including (A) interest on deposits with persons carrying on the banking business, paid to persons not engaged in business within the United States and not having an office or place of business therein * * *". The most significant inference to be drawn from this phrase is that it is another example of the consistent purpose exhibited in the Act not to tax non-resident aliens or foreign corporations on interest except to the limited extent set out. The Board, however, drew the further (and, as we agree, the correct) inference that since the phrase in terms excludes bank interest only when paid to foreigners not engaged in business in the United States and having no office here, and does not exclude it when paid to foreigners engaged in business, or having an office here, Congress manifested an intention that bank interest was included in interest on "other interest-bearing obligations". From this, the Board concluded (and it is here we disagree) that "other interest-bearing obligations" should not be construed as *ejusdem generis* with bonds and notes.

The fallacy of that conclusion lies in the erroneous premise that the obligation of a bank to a depositor is not *ejusdem generis* with bonds and notes. What are obligations of the same kind or nature as bonds or notes? Clearly, the obligation to repay money loaned, even though not reduced to a written promise, is of the same character as if the note were given. Clearly, the obligation of an investment is *ejusdem generis* with a bond, whether or not evidenced by a certificate. Clearly, the non-contractual obligation of a judgment debtor or the obligation to refund taxes unlawfully exacted is not of the same nature as either a loan or an investment.

In the view of respondent, the interest here in question was not interest on a bond, note or other interest-bearing obligation within the purview of Section 217(a)(1) of the Revenue Act of 1926.

The respondent believes it to be equally plain that the interest, even though it were upon an obligation within the meaning of Section 217(a)(1) was not upon the obligation of a resident. This Court has often held that a statute should be read according to the natural and obvious import of the language, and it seems clear that the natural and obvious import of the word "resident" is one who has an abode or residence.

In *Consorzio Veneziano di Armamento e Navigazione* v. *Commissioner*, 21 B. T. A. 984, the Board of Tax Appeals stated at pages 988, 989:

> "The expression 'resident' in its ordinary acceptation does not refer to the Government itself and the language in the statute 'residents, corporate or otherwise', we think should be given its ordinary and generally accepted meaning. This view finds support in article 1509 of Regulations 69, with respect to this section of the statute, which states that a 'domestic corporation is a resident corporation * * *.' The regulations of the Commissioner construe the language in its ordinary and

> generally accepted meaning and make no reference to the Government as being 'resident, corporate or otherwise'."

Likewise in the case of the *State, A. R. Montgomery, Prosecutor* v. *Inhabitants of the City of Trenton*, 40 N. J. L. 89, 91, the Supreme Court of Judicature of the State of New Jersey held that indebtedness to the State could not be deducted from the taxable value of property under a statute permitting the deduction of indebtedness to residents; and said, in part:

> "It is only by the greatest latitude of construction that we can say that the state resides within the state. The word 'residing' refers to individual abode, though it is sometimes used figuratively. It will not apply to the state in its representative and governmental relation to its citizens. The people, as individuals, reside in the state, but the political body called the state cannot be said, in the proper use of language, to reside anywhere."

Even to extend the word "resident" beyond a natural person to a private corporation, Congress apparently thought it necessary so to state. Surely had it been intended to include the United States, words to that effect would have been included, and the Board of Tax Appeals so pointed out in *Consorzio Veneziano di Armamento e Navigazione* v. *Commissioner, supra.* As stated by the Board in that case, wherever in the Revenue Acts obligations of the United States are referred to, they are referred to by that name.

Moreover the construction asked by the petitioner involves two dilemmas.

Section 213(b)(4) of the Revenue Act of 1926 provides that the term "gross income" does not include, and that there shall be exempt from taxation, "interest upon * * * the obligations of the United States * * *."

The context in the quoted part of Section 213 is similar to the context in Section 217(a)(1). In each case, the word "obligations" is used in connection with other words referring to particular kinds of obligations in the nature of loans or investments. In a number of cases, it has been held that interest upon a refund of taxes, and interest upon other non-contractual obligations of the United States or a State or Municipality is not interest upon an obligation within the meaning of Section 213.

American Viscose Corporation v. *Commissioner*, 56 Fed. (2d.) 1033 (C. C. A. 3), Certiorari denied, 287 U. S. 615;
United States Trust Co. v. *Anderson*, 65 Fed. (2d.) 575 (C. C. A. 2);
Missouri Pacific R. R. Co. v. *Commissioner*, 22 B. T. A. 267;
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Isham v. *Commissioner*, 26 B. T. A. 1040;
I. T. 1748 Cum. Bul. II-2, 92-93;
I. T. 2210 Cum. Bul. IV-2, 43.

The obvious dilemma that if this interest be construed to be upon an obligation of the United States so as to be taxable under Section 217, then it is exempt by Section 213, is avoided by the application of the construction contended for by the respondent.

Even if this interest be held to be upon an obligation within the purview of Section 217, but not upon an obligation within the purview of Section 213, still the same is relieved from tax by Section 236(a) of the Revenue Act of 1926, which allows as a credit, in computing net income, "the amount received as interest upon obligations of the United States which is included in gross income * * *." This dilemma also is avoided by the construction asked by respondent.

III.

The question presented in this case is of no prospective importance.

In the proposed Revenue Act of 1934 (H. R. 7835, 73rd Congress 2nd. Sess.), as passed by the House of Representatives, Section 119(a)(1), which is the corresponding provision to Section 217(a)(1) of the Revenue Act of 1926, has been amended to provide that "* * * Interest from the United States, any Territory, any political subdivision of a Territory, or the District of Columbia, and interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise * * *", shall be treated as income from sources within the United States. The House of Representatives' Ways and Means Committee Report on the proposed Revenue Act of 1934 (Report No. 704, 73rd Congress, 2d. Sess., page 32) comments upon this change as follows:

> "Section 119. Income from sources within United States: Subsection (a)(1) of the present law has been construed by the courts to exempt nonresident aliens and foreign corporations from Federal income tax on any interest paid by the United States, the Territories, or the District of Columbia, on their obligations, tax refunds, or judgments. While it is not believed Congress intended to exempt such income from tax, the proposed change is made in order to remove any doubt as to the future."

The question presented by this case is of no prospective importance, for the reason that the Congress has the matter under consideration, and, it is to be presumed, will make such change as it may deem desirable for the future.

Conclusion.

The decision of the court below appears to be correct. The question upon which review is prayed is of no prospective general importance and in spite of the conflict of decisions referred to in the petition, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y., April 12, 1934.

Appendix.

Revenue Act of 1913, c. 16, 38 Stat. 166, Sec. II A, subdivision 1:

> "* * * a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

Revenue Act of 1916, c. 413, 39 Stat. 756, Sec. 10:

> "* * * a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the United States by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, * * *".

Revenue Act of 1918, c. 18, 40 Stat. 1077, Sec. 233(b):

> "In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States."

Senate Finance Committee Report, Revenue Act of 1921 (Report No. 275, 67th Congress, 1st Sess., p. 16):

> "Section 217 states explicit rules—applicable principally to nonresident aliens and foreign traders—for computing the net income derived from sources within the United States. The present law is both obscure and economically unsound, inasmuch as the Attorney General has held that where goods are manufactured or produced in the United States and sold abroad, no part of the profit is derived from a source within the United States. This section explicitly allocates certain important sources of income to the United States or to foreign countries, as the case may be, * * *."

House of Representatives Ways and Means Committee Report, Revenue Act of 1921 (Report No. 350, 67th Congress, 1st Sess., p. 12):

> "Section 223: The necessity for changing the law relating to the taxation of foreign traders has been explained in the discussion of section 201. It is further necessary to clarify and change the present law relating to 'income derived from sources within the United States', inasmuch as the Attorney General has held that where goods are manufactured or produced in the United States and sold abroad no part of the profit is derived from a source within the United States. Section 223 of the proposed bill explicitly allocates certain important sources of income within or without the United States, as the case may be * * *."

Revenue Act of 1921, c. 136, 42 Stat. 254:

Sec. 233(b):

"In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined * * * in the manner provided in section 217."

Sec. 217, c. 136, 42 Stat. 243:

"(a) * * * the following items of gross income shall be treated as income from sources within the United States:

"(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, * * *.

* * * * *

"(c) The following items of gross income shall be treated as income from sources without the United States:

"(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a); * * *."

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